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SENATE

REPORT
No. 97-644

EXPORT TRADING COMPANY ACT OF 1982

OCTOBER 1 (legislative day, SEPTEMBER 8), 1982.—Ordered to be printed

Mr. GARN, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 734]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 734) to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

TITLE I—GENERAL PROVISIONS

SHORT TITLE

SEC. 101. This title may be cited as the "Export Trading Company Act of 1982".

FINDINGS; DECLARATION OF PURPOSE

SEC. 102. (a) The Congress finds that—

(1) United States exports are responsible for creating and maintaining one out of every nine manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

(2) the rapidly growing service-related industries are vital to the well-being of the United States economy inasmuch as they create jobs for seven out of every ten Americans, provide 65 per-

S243-8

cent of the Nation's gross national product, and offer the greatest potential for significantly increased industrial trade involving finished products;

(3) trade deficits contribute to the decline of the dollar on international currency markets and have an inflationary impact on the United States economy;

(4) tens of thousands of small- and medium-sized United States businesses produce exportable goods or services but do not engage in exporting;

(5) although the United States is the world's leading agricultural exporting nation, many farm products are not marketed as widely and effectively abroad as they could be through export trading companies;

(6) export trade services in the United States are fragmented into a multitude of separate functions, and companies attempting to offer export trade services lack financial leverage to reach a significant number of potential United States exporters;

(7) the United States needs well-developed export trade intermediaries which can achieve economies of scale and acquire expertise enabling them to export goods and services profitably, at low per unit cost to producers;

(8) the development of export trading companies in the United States has been hampered by business attitudes and by Goverment regulations;

(9) those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State, and regional economic needs;

(10) if United States trading companies are to be successful in promoting United States exports and in competing with foreign trading companies, they should be able to draw on the resources, expertise, and knowledge of the United States banking system, both in the United States and abroad; and

(11) the Department of Commerce is responsible for the development and promotion of United States exports, and especially for facilitating the export of finished products by United States manufacturers.

(b) It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by establishing an office within the Department of Commerce to promote the formation of export trade associations and export trading companies, by permitting bank holding companies, bankers' banks, and Edge Act corporations and agreement corporations that are subsidiaries of bank holding companies to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions, and by modifying the application of the antitrust laws to certain export trade.

DEFINITIONS

SEC. 103. (a) For purposes of this title—

(1) the term "export trade" means trade or commerce in goods or services produced in the United States which are exported, or in the course of being exported, from the United States to any other country;

(2) the term "services" includes, but is not limited to, accounting, amusement, architectural, automatic data processing, business, communications, construction franchising and licensing, consulting, engineering, financial, insurance, legal, management, repair, tourism, training, and transportation services;

(3) the term "export trade services" includes, but is not limited to, consulting, international market research, advertising, marketing, insurance, product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

(4) the term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of—

(A) exporting goods or services produced in the United States; or

(B) facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services;

(5) the term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(6) the term "United States" means the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(7) the term "antitrust laws" means the antitrust laws as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition, and any State antitrust or unfair competition law.

(b) The Secretary of Commerce may by regulation further define any term defined in subsection (a), in order to carry out this title.

OFFICE OF EXPORT TRADE IN DEPARTMENT OF COMMERCE

SEC. 104. The Secretary of Commerce shall establish within the Department of Commerce an office to promote and encourage to the greatest extent feasible the formation of export trade associations and export trading companies. Such office shall provide information and advice to interested persons and shall provide a referral

service to facilitate contact between producers of exportable goods and services and firms offering export trade services.

TITLE II—BANK EXPORT SERVICES

SHORT TITLE

SEC. 201. This title may be cited as the "Bank Export Services Act".

SEC. 202. The Congress hereby declares that it is the purpose of this title to provide for meaningful and effective participation by bank holding companies bankers' banks, and Edge Act corporations, in the financing and development of export trading companies in the United States. In furtherance of such purpose, the Congress intends that, in implementing its authority under section 4(c)(14) of the Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System should pursue regulatory policies that—

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad;

(2) afford to United States commerce, industry and agriculture especially small and medium-size firms, a means of exporting at all times;

(3) foster the participation by regional and smaller banks in the development of export trading companies; and

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

INVESTMENTS IN EXPORT TRADING COMPANIES

SEC. 203. Section 4(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)) is amended—

(1) in paragraph (12)(B), by striking out "or" at the end thereof;

(2) in paragraph (13), by striking out the period at the end thereof and inserting in lieu thereof "; or"; and

(3) by inserting after paragraph (13) the following:

"(14) shares of any company which is an export trading company whose acquisition (including each acquisition of shares) or formation by a bank holding company has not been disapproved by the Board pursuant to this paragraph, except that such investments, whether direct or indirect, in such shares shall not exceed 5 per centum of the bank holding company's consolidated capital and surplus.

"(A)(i) No bank holding company shall invest in an export trading company under this paragraph unless the Board has been given sixty days' prior written notice of such proposed investment and within such period has not issued a notice disapproving the proposed investment or extending for up to another thirty days the period during which such disapproval may be issued.

"(ii) The period for disapproval may be extended for such additional thirty-day period only if the Board determines that a bank holding company proposing to invest in an export trading company has not furnished all the information required to be submitted or that in the Board's judgment any material information submitted is substantially inaccurate.

"(iii) The notice required to be filed by a bank holding company shall contain such relevant information as the Board shall require by regulation or by specific request in connection with any particular notice.

"(iv) The Board may disapprove any proposed investment only if—

"(I) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

"(II) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company, or

"(III) the bank holding company fails to furnish the information required under clause (iii).

"(v) Within three days after a decision to disapprove an investment, the Board shall notify the bank holding company in writing of the disapproval and shall provide a written statement of the basis for the disapproval.

"(vi) A proposed investment may be made prior to the expiration of the disapproval period if the Board issues written notice of its intent not to disapprove the investment.

"(B)(i) The total amount of extensions of credit by a bank holding company which invests in an export trading company, when combined with all such extensions of credit by all the subsidiaries of such bank holding company, to an export trading company shall not exceed at any one time 10 per centum of the bank holding company's consolidated capital and surplus. For purposes of the preceding sentence, an extension of credit shall not be deemed to include any amount invested by a bank holding company in the shares of an export trading company.

"(ii) No provision of any other Federal law in effect on October 1, 1982, relating specifically to collateral requirements shall apply with respect to any such extension of credit.

"(iii) No bank holding company or subsidiary of such company which invests in an export trading company may extend credit to such export trading company or to customers of such export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extension of credit shall not involve more than the normal risk of repayment or present other unfavorable features.

"(C) For purposes of this paragraph, an export trading company—

"(i) may engage in or hold shares of a company engaged in the business of underwriting, selling, or distributing securities in the United States only to the extent that any bank holding company which invests in such export trading company may do so under applicable Federal and State banking laws and regulations; and

"(ii) may not engage in agricultural production activities or in manufacturing, except for such incidental product modification including repackaging, reassembling or extracting byproducts, as is necessary to enable United States goods or services to conform with requirements of a foreign country and to facilitate their sale in foreign countries.

"(D) A bank holding company which invests in an export trading company may be required, by the Board, to terminate its investment or may be made subject to such limitations or conditions as may be imposed by the Board, if the Board determines that the export trading company has taken positions in commodities or commodity contracts, in securities, or in foreign exchange, other than as may be necessary in the course of the export trading company's business operations.

"(E) Notwithstanding any other provision of law, an Edge Act corporation, organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611–631), which is a subsidiary of a bank holding company, or an agreement corporation, operating subject to section 25 of the Federal Reserve Act (12 U.S.C. 601–604(a)), which is a subsidiary of a bank holding company, may invest directly and indirectly in the aggregate up to 5 per centum of its consolidated capital and surplus (25 per centum in the case of a corporation not engaged in banking) in the voting stock of other evidences of ownership in one or more export trading companies.

"(F) For purposes of this paragraph—

"(i) the term 'export trading company' means a company which does business under the laws of the United States or any State, which is exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States or for purposes of facilitating the exportation of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services.

"(ii) the term 'export trade services' includes, but is not limited to, consulting, international market research, advertising, marketing, insurance (other than acting as principal, agent or broker in the sale of insurance on risks resident or located, or activities performed, in the United States, except for insurance covering the transportation of cargo from any point of

origin in the United States to a point of final destination outside the United States), product research and design, legal assistance, transportation, including trade documentation and freight forwarding, communication and processing of foreign orders to and for exporters and foreign purchasers, warehousing, foreign exchange, financing, and taking title to goods, when provided in order to facilitate the export of goods or services produced in the United States;

"(iii) the term 'bank holding company' shall include a bank which (I) is organized solely to do business with other banks and their officers, directors, or employees; (II) is owned primarily by the banks with which it does business; and (III) does not do business with the general public. No such other bank, owning stock in a bank described in this clause that invests in an export trading company, shall extend credit to an export trading company in an amount exceeding at any one time 10 per centum of such other bank's capital and surplus; and

"(iv) the term 'extension of credit' shall have the same meaning given such term in the fourth paragraph of section 23A of the Federal Reserve Act.".

SEC. 205. On or before two years after the date of the enactment of this Act, the Federal Reserve Board shall report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives the Board's recommendations with respect to the implementation of this section, the Board's recommendations on any changes in United States law to facilitate the financing of United States exports, especially by small, medium-size, and minority business concerns, and the Board's recommendations on the effects of ownership of United States banks by foreign banking organizations affiliated with trading companies doing business in the United States.

GUARANTEES FOR EXPORT ACCOUNTS RECEIVABLE AND INVENTORY

SEC. 206. The Export-Import Bank of the United States is authorized and directed to establish a program to provide guarantees for loans extended by financial institutions or other public or private creditors to export trading companies as defined in section 4(c)(14)(F)(i) of the Bank Holding Company Act of 1956, or to other exporters, when such loans are secured by export accounts receivable or inventories of exportable goods, and when in the judgment of the Board of Directors—

(1) the private credit market is not providing adequate financing to enable otherwise creditworthy export trading companies or exporters to consummate export transactions; and

(2) such grarantees would facilitate expansion of exports which would not otherwise occur.

The Board of Directors shall attempt to insure that a major share of any loan guarantees ultimately serves to promote exports from small, medium-size, and minority businesses or agricultural con-

cerns. Guarantees provided under the authority of this section shall be subject to limitations contained in annual appropriations Acts.

BANKERS' ACCEPTANCES

SEC. 207. The seventh paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 372) is amended to read as follows:

"(7)(A) Any member bank and any Federal or State branch or agency of a foreign bank subject to reserve requirements under section 7 of the International Banking Act of 1978 (hereinafter in this paragraph referred to as 'institutions'), may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace—

"(i) which grow out of transactions involving the importation or exportation of goods;

"(ii) which grow out of transactions involving the domestic shipment of goods; or

"(iii) which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples.

"(B) Except as provided in subparagraph (C), no institution shall accept such bills, or be obligated for a participation share in such bills, in an amount equal at any time in the aggregate to more than 150 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(C) The Board, under such conditions as it may prescribe, may authorize, by regulation or order, any institution to accept such bills, or be obligated for a participation share in such bills, in an amount not exceeding at any time in the aggregate 200 per centum of its paid up and unimpaired capital stock and surplus or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H).

"(D) Notwithstanding subparagraphs (B) and (C), with respect to any institution, the aggregate acceptances, including obligations for a participation share in such acceptances, growing out of domestic transactions shall not exceed 50 per centum of the aggregate of all acceptances, including obligations for a participation share in such acceptances, authorized for such institution under this paragraph.

"(E) No institution shall accept bills, or be obligated for a participation share in such bills, whether in a foreign or domestic transaction, for any one person, partnership, corporation, association or other entity in an amount equal at any time in the aggregate to more than 10 per centum of its paid up and unimpaired capital stock and surplus, or, in the case of a United States branch or agency of a foreign bank, its dollar equivalent as determined by the Board under subparagraph (H), unless the institution is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance.

"(F) With respect to an institution which issues an acceptance, the limitations contained in this paragraph shall not apply to that por-

tion of an acceptance which is issued by such institution and which is covered by a participation agreement sold to another institution.

"(G) In order to carry out the purposes of this paragraph, the Board may define any of the terms used in this paragraph, and, with respect to institutions which do not have capital or capital stock, the Board shall define an equivalent measure to which the limitations contained in this paragraph shall apply.

"(H) Any limitation or restriction in this paragraph based on paid-up and unimpaired capital stock and surplus of an institution shall be deemed to refer, with respect to a United States branch or agency of a foreign bank, to the dollar equivalent of the paid-up capital stock and surplus of the foreign bank, as determined by the Board, and if the foreign bank has more than one United States branch or agency, the business transacted by all such branches and agencies shall be aggregated in determining compliance with the limitation or restriction.".

TITLE III—EXPORT TRADE CERTIFICATES OF REVIEW

EXPORT TRADE PROMOTION DUTIES OF SECRETARY OF COMMERCE

SEC. 301. To promote and encourage export trade, the Secretary may issue certificates of review and advise and assist any person with respect to applying for certificates of review.

APPLICATION FOR ISSUANCE OF CERTIFICATE OF REVIEW

SEC. 302. (a) To apply for a certificate of review, a person shall submit to the Secretary a written application which—

(1) specifies conduct limited to export trade, and

(2) is in a form and contains any information, including information pertaining to the overall market in which the applicant operates, required by rule or regulation promulgated under section 310.

(b)(1) Within 10 days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall publish in the Federal Register a notice that announces that an application for a certificate of review has been submitted, identifies each person submitting the application, and describes the conduct for which the application is submitted.

(2) Not later than 7 days after an application submitted under subsection (a) is received by the Secretary, the Secretary shall transmit to the Attorney General—

(A) a copy of the application,

(B) any information submitted to the Secretary in connection with the application, and

(C) any other relevant information (as determined by the Secretary) in the possession of the Secretary, including information regarding the market share of the applicant in the line of commerce to which the conduct specified in the application relates.

ISSUANCE OF CERTIFICATE

SEC. 303. (a) A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will—

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

(b) Within 90 days after the Secretary receives an application for a certificate of review, the Secretary shall determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of subsection (a). If the Secretary, with the concurrence of the Attorney General, determines that such standards are met, the Secretary shall issue to the applicant a certificate of review. The certificate of review shall specify—

(1) the export trade, export trade activities, and methods of operation to which the certificate applies,

(2) the person to whom the certificate of review is issued, and

(3) any terms and conditions the Secretary or the Attorney General deems necessary to assure compliance with the standards of subsection (a).

(c) If the applicant indicates a special need for prompt disposition, the Secretary and the Attorney General may expedite action on the application, except that no certificate of review may be issued within 30 days of publication of notice in the Federal Register under section 302(b)(1).

(d)(1) If the Secretary denies in whole or in part an application for a certificate, he shall notify the applicant of his determination and the reasons for it.

(2) An applicant may, within 30 days of receipt of notification that the application has been denied in whole or in part, request the Secretary to reconsider the determination. The Secretary, with the concurrence of the Attorney General, shall notify the applicant of the determination upon reconsideration within 30 days of receipt of the request.

(e) If the Secretary denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of documents submitted by the applicant in connection with the application for the certificate, the Secretary and the Attorney General shall return to the applicant, not later than 30 days after receipt of the request, the documents and all copies of the documents available to the Secretary and the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(f) A certificate shall be void ab initio with respect to any export trade, export trade activities, or methods of operation for which a certificate was procured by fraud.

REPORTING REQUIREMENT; AMENDMENT OF CERTIFICATE; REVOCATION OF CERTIFICATE

SEC. 304. (a)(1) Any applicant who receives a certificate of review—

(A) shall promptly report to the Secretary any change relevant to the matters specified in the certificate, and

(B) may submit to the Secretary an application to amend the certificate to reflect the effect of the change on the conduct specified in the certificate.

(2) An application for an amendment to a certificate of review shall be treated as an application for the issuance of a certificate. The effective date of an amendment shall be the date on which the application for the amendment is submitted to the Secretary.

(b)(1) If the Secretary or the Attorney General has reason to believe that the export trade, export trade activities, or methods of operation of a person holding a certificate of review no longer comply with the standards of section 303(a), the Secretary shall request such information from such person as the Secretary or the Attorney General deems necessary to resolve the matter of compliance. Failure to comply with such request shall be grounds for revocation of the certificate under paragraph (2).

(2) If the Secretary or the Attorney General determines that the export trade, export trade activities, or methods of operation of a person holding a certificate no longer comply with the standards of section 303(a), or that such person has failed to comply with a request made under paragraph (1), the Secretary shall give written notice of the determination to such person. The notice shall include a statement of the circumstances underlying, and the reasons in support of, the determination. In the 60-day period beginning 30 days after the notice is given, the Secretary shall revoke the certificate or modify it as the Secretary or the Attorney General deems necessary to cause the certificate to apply only to the export trade, export trade activities, or methods of operation which are in compliance with the standards of section 303(a).

(3) For purposes of carrying out this subsection, the Attorney General, and the Assistant Attorney General in charge of the antitrust division of the Department of Justice, may conduct investigations in the same manner as the Attorney General and the Assistant Attorney General conduct investigations under section 3 of the Antitrust Civil Process Act, except that no civil investigative demand may be issued to a person to whom a certificate of review is issued if such person is the target of such investigation.

JUDICIAL REVIEW; ADMISSIBILITY

SEC. 305. (a) If the Secretary grants or denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or modifies a certificate pursuant to section 304(b), any person aggrieved by such determination may, within 30 days of the determination, bring an action in any appropriate district court of the United States to set aside the determination on the ground that such determination is erroneous.

(b) Except as provided in subsection (a), no action by the Secretary or the Attorney General pursuant to this title shall be subject to judicial review.

(c) If the Secretary denies, in whole or in part, an application for a certificate of review or for an amendment to a certificate, or revokes or amends a certificate, neither the negative determination nor the statement of reasons therefor shall be admissible in evidence, in any administrative or judicial proceeding, in support of any claim under the antitrust laws.

PROTECTION CONFERRED BY CERTIFICATE OF REVIEW

SEC. 306. (a) Except as provided in subsection (b), no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 303 which certificate was in effect when the conduct occurred.

(b)(1) Any person who has been injured as a result of conduct engaged in under a certificate of review may bring a civil action for injunctive relief, actual damages, the loss of interest on actual damages, and the cost of suit (including a reasonable attorney's fee) for the failure to comply with the standards of section 303(a). Any action commenced under this title shall proceed as if it were an action commenced under section 4 or section 16 of the Clayton Act, except that the standards of section 303(a) of this title and the remedies provided in this paragraph shall be the exclusive standards and remedies applicable to such action.

(2) Any action brought under paragraph (1) shall be filed within two years of the date the plaintiff has notice of the failure to comply with the standards of section 303(a) but in any event within four years after the cause of action accrues.

(3) In any action brought under paragraph (1), there shall be a presumption that conduct which is specified in and complies with a certificate of review does comply with the standards of section 303(a).

(4) In any action brought under paragraph (1), if the court finds that the conduct does comply with the standards of section 303(a), the court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim (including a reasonable attorney's fee).

(5) The Attorney General may file suit pursuant to section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

GUIDELINES

SEC. 307. (a) To promote greater certainty regarding the application of the antitrust laws to export trade, the Secretary, with the concurrence of the Attorney General, may issue guidelines—

(1) describing specific types of conduct with respect to which the Secretary, with the concurrence of the Attorney General, has made or would make, determinations under sections 303 and 304, and

(2) summarizing the factual and legal bases in support of the determinations.

(b) Section 553 of title 5, United States Code, shall not apply to the issuance of guidelines under subsection (a).

ANNUAL REPORTS

SEC. 308. Every person to whom a certificate of review is issued shall submit to the Secretary an annual report, in such form and at such time as the Secretary may require, that updates where necessary the information required by section 302(a).

DISCLOSURE OF INFORMATION

SEC. 309. (a) Information submitted by any person in connection with the issuance, amendment, or revocation of a certificate of review shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding, subject to appropriate protective orders,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Secretary deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule or regulation promulgated under section 310 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

RULES AND REGULATIONS

SEC. 310. The Secretary, with the concurrence of the Attorney General, shall promulgate such rules and regulations as are necessary to carry out the purposes of this Act.

DEFINITIONS

SEC. 311. As used in this title—

(1) the term "export trade" means trade or commerce in goods, wares, merchandise, or services exported, or in the course of

being exported, from the United States or any territory thereof to any foreign nation,

(2) the term "service" means intangible economic output, including, but not limited to—

(A) business, repair, and amusement services,

(B) management, legal, engineering, architectural, and other professional services, and

(C) financial, insurance, transportation, informational and any other data-based services, and communication services,

(3) the term "export trade activities" means activities or agreements in the course of export trade,

(4) the term "methods of operation" means any method by which a person conducts or proposes to conduct export trade,

(5) the term "person" means an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between or among such persons,

(6) the term "antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C 45) (to the extent that section 5 prohibits unfair methods of competition), and any State antitrust or unfair competition law,

(7) the term "Secretary" means the Secretary of Commerce or his designee, and

(8) the term "Attorney General" means the Attorney General of the United States or his designee.

EFFECTIVE DATES

SEC. 312. (a) Except as provided in subsection (b), this title shall take effect on the date of the enactment of this Act.

(b) Section 302 and section 303 shall take effect 90 days after the effective date of the rules and regulations first promulgated under section 310.

TITLE IV—FOREIGN TRADE ANTITRUST IMPROVEMENTS

SHORT TITLE

SEC. 401. This title may be cited as the "Foreign Trade Antitrust Improvements Act of 1982".

AMENDMENT TO SHERMAN ACT

SEC. 402. The Sherman Act (15 U.S.C. 1 et seq.) is amended by inserting after section 6 the following new section:

"SEC. 7. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

"(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

"(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

"(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

"(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.".

AMENDMENT TO FEDERAL TRADE COMMISSION ACT

SEC. 403. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by adding at the end thereof the following new paragraph:

"(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

"(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

"(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

"(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

"(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.".

And the House agree to the same.

That the House recede from its amendment to the title of the Senate bill.

For title I of the House amendment and modifications committed to conference:

JAKE GARN,
JOHN HEINZ,
WILLIAM ARMSTRONG,
JOHN H. CHAFEE,
JOHN C. DANFORTH,
DON RIEGLE,
BILL PROXMIRE,
CHRISTOPHER J. DODD,
ALAN DIXON,
Managers on the Part of the Senate.

For title I of the House amendment and modifications committed to conference:

CLEMENT J. ZABLOCKI,
JONATHAN BINGHAM,
DENNIS E. ECKART,
DON BONKER,
HOWARD WOLPE,
WM. BROOMFIELD,
ROBERT J. LAGOMARSINO,
ARLEN ERDAHL,
BENJAMIN A. GILMAN,
MILLICENT FENWICK,

For title II of the House amendment and modifications committed to conference:

FERNAND ST GERMAIN,
FRANK ANNUNZIO,
JOE MINISH,
JOHN J. LAFALCE,
DOUG BARNARD, JR.
J. W. STANTON,
CHALMERS P. WYLIE,
STEWART B. MCKINNEY,
JIM LEACH,

For title III of the House amendment and modifications committed to conference:

PETER W. RODINO,
BILL HUGHES,
ROBERT MCCLORY,
M. CALDWELL BUTLER,
Managers on the Part of the House.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 734) to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE I

SHORT TITLE

The committee of conference agreed to the House provision: "The Export Trading Company Act of 1982".

FINDINGS

The House amendment contains Congressional findings with respect to the impact of exports on U.S. jobs, the role of service-related industries in U.S. exports, the effects of trade deficits on the value of the dollar, and the responsibilities of the Department of Commerce in export promotion, which are not contained in the Senate bill.

The Senate bill contains findings with respect to the role of the United States as an exporter of agricultural products, and the need for exporters to achieve greater economies of scale, which are not in the House amendment. Other Senate and House findings are similar or identical.

The committee of conference agreed to a combination of the House and Senate provisions, all the findings in the House amendment and an amended version of the Senate finding with respect to agricultural exports.

PURPOSE

The statement of the bill's purpose in the House amendment includes references to the creation of an export trading company promotion office in the Department of Commerce, investment by certain banks in export trading companies, and modification of antitrust laws with respect to export trade, references which are not contained in the Senate bill.

The committee of conference agreed to the House provision with an amendment adding reference to the Edge Act and Agreement corporations as being eligible to invest in trading companies if those corporations are subsidiaries of bank holding companies.

DEFINITIONS

A. The committee of conference agreed and reaffirmed that the definitions contained in title I of the bill apply only to the provisions of title I, and not to the other titles of the bill. To the extent possible, however, the definitions recommended by the committee of conference in title I confrom with the definitions recommended in other titles.

The Senate bill defines "goods produced in the United States" as those containing no more then 50% (by value) imported components or materials.

The House amendment contains no such definition.

The committee of conference deletes this definition.

Specific consideration was given to the status, under this and other definitions in the bill, of fish harvested by U.S. flag vessels within the United States fish conservation zone and sold at sea or in a foreign port without having otherwise been landed or processed in the United States. The committee of conference agreed that fish so harvested and sold should be regarded as goods produced in the United States, and their sales as constituting export trade within the meaning of this title and other titles of the bill.

B. The definition of "services produced in the United States" in the Senate bill and the definition of "services" in the House amendment are similar, except that the Senate bill includes some services not mentioned in the House provision, and contains the additional requirement that at least 50% of the value of such services be attributable to the United States.

The committee of conference agreed to the House provision with an amendment to include additional specific services contained in the Senate bill.

C. The definition of "export trade services" in the Senate bill includes "product research and design", which is not specified in the House amendment.

The committee of conference agreed to the Senate provision.

D. The definition of "export trading company" in the Senate bill includes nonprofit organizations, which is not contained in the House amendment. The definition in the House amendment requires export trading companies to be operated principally for the export of U.S. goods, or for facilitating such exports by unaffiliated persons, while the Senate bill requires both.

The committee of conference agreed to a compromise of the Senate and House provisions which includes nonprofit organiza-

tions, but permits export trading companies to perform only one of the two functions contained in both the House and Senate provisions.

E. The House amendment includes definitions of "export trade association" and "State."

The Senate bill has no such provision.

The committee of conference adopted the Senate position.

E. The Senate bill includes a definition of "Secretary", as meaning the Secretary of Commerce.

The House amendment contains no such definition.

The committee of conference agreed with the House position.

F. A definition of "company" contained in the Senate bill, but not in the House amendment, is incorporated in the definition of "export trading company" adopted by the committee of conference.

The conference substitute includes a definition of "anti-trust laws" contained in title III of the Senate bill, but not contained in the House bill, with an amendment deleting reference to section 6 of the Federal Trade Commission Act.

Issuance of Regulations

The Senate bill authorizes the Secretary of Commerce by regulation to further define terms contained in title I.

The House amendment contains no such authorization.

The committee of conference agreed to the Senate provision.

Office of Export Trade

The House amendment directs the Secretary of Commerce to establish an office in that Department to promote and assist export trade associations and export trading companies.

The Senate bill similarly directs the Secretary to promote export trading companies, but does not require the establishment of a Commerce Department office for that purpose.

The committee of conference agreed to the House provision.

TITLE II—BANK EXPORT SERVICES ACT

The Senate receded to the House insofar as the basic statutory framework within which bank-affiliated export trading companies (ETCs) will operate. By placing the ETC within the bank holding company structure rather than within the bank, as the Senate bill provided, the conferees believe that adequate safeguards will continue to exist to minimize potential risk to the bank or banks within the holding company structure and that adequate separation will exist between a bank's involvement in export trade activities and its deposit taking function. The decision to accept the bank holding company structure carried with it to a large extent the utilization of existing regulatory provisions in effect in connection with existing bank holding application practices and procedures except where modified to insure an adequate but yet a minimal regulatory presence. The House, consequently, receded to the Senate to ensure a streamlined application process with respect to basic definitional matters such as what an ETC is and what activities it can engage in, and on a number of ancillary matters such as

the authorization for Export-Import Bank loan guarantees. In addition, definitive guidance is provided to the Federal Reserve Board on how to implement this new statute in a way that will insure the rapid growth of ETCs consistent with the purposes of this Act without unnecessary regulation.

Regulatory Framework

S. 734, as a free standing statute, would have permitted a wide variety of banking institutions to invest in ETCs. Inasmuch as these institutions are regulated by a number of different governmental agencies, S. 734 required a number of general regulatory provisions. H.R. 6016, reported by the House Committee on Banking, Finance and Urban Affairs, on the other hand, elected to restrict banking institution investment in ETCs to bank holding companies and bankers' banks, and therefore constructed its version of this legislation as an amendment to the Bank Holding Company Act of 1956 (treating bankers' banks as holding companies for purposes of this Act). As a result, the various constraints on bank holding company activities already in the Bank Holding Company Act would also automatically apply to investment in ETCs, and it was not necessary to repeat them in the House version of the legislation. Similarly, the restriction on investment to bank holding companies allowed the House to dispense with much of the regulatory complexity of the Senate bill.

In conference, the managers on the part of the Senate, recognizing the House's preference for channeling risks of this kind through holding companies rather than through banks directly, agreed to recede to the House on most basic structural issues, with certain modifications.

As a result, the provisions of the House amendment relating to the amount of bank holding company capital and surplus which can be invested in or loaned to an ETC, the 60-day disapproval procedure on the part of the Federal Reserve Board for such proposed investments, including the notification provision, and the exemption from Section 23A of the Federal Reserve Act are all incorporated in the conference agreement. Similarly, the Senate provisions relating to judicial review, rulemaking authority, state banking laws, and protection of the safety and soundness of the bank, are all deleted, largely because they are covered by various sections of the Bank Holding Company Act which will now apply to investment in ETCs by virtue of the conferees' decision to accept the House approach of placing ETC within that Act. The Senate also receded to the House and agreed to eliminate the restriction on an ETC having the same name as its bank organization parent.

There were, however, several areas where the conferees made significant modifications in the approach of the House amendment.

Guidance to the Federal Reserve Board

Most important in that regard is the decision of the conferees to provide additional guidance to the Federal Reserve Board in administering this Act through the addition of a new Section 202 at the beginning of Title II. This section declares it to be the purpose of Title II to provide for meaningful and effective participation by

bank holding companies in the financing and development of export trading companies, and that, specifically, the Board should pursue regulatory policies that:

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions in the United States and abroad.

(2) afford to United States commerce, industry and agriculture, especially small and medium-size firms, a means of exporting at all times;

(3) foster the participation by regional and smaller banks in the development of export trading companies, and

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms that provide for the efficient combination of complementary trade and financing services designed to create export trading companies that can handle all of an exporting company's needs.

These objectives, along with the purpose set forth in Title I of the Act, if properly pursued by the Federal Reserve Board, will guarantee the development of effective, "full-service" trading companies with bank holding company involvement that will effectively and aggressively market American products and will not be disadvantaged or limited in competing with foreign-owned export trading companies or with ETCs owned by nonbank firms.

The new section 4(c)(14)(A)(iv) of the Bank Holding Company Act created by the conference substitute provides for disapproval of proposed investments in an export trading company only if the Board determines:

(1) such disapproval is necessary to prevent unsafe or unsound banking practices, undue concentration of resources, decreased or unfair competition, or conflicts of interest;

(2) the Board finds that such investment would affect the financial or managerial resources of a bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company; or

(3) the bank holding company fails to furnish the information required by Board regulations.

The second criterion above is a modification proposed by the Senate conferees and accepted by the House. The original language of the House amendment referred only to the "financial or managerial resources of the companies involved." However, the legislative history of that amendment suggested a narrower intent, i.e., "risk to the bank".

In order to reach the intent of the amendment more closely, the conferees agreed on revised wording to clarify the expectation that the Board will focus on risk to the bank, as opposed to other affiliates, and on the specific impact the proposed investment will have on the bank.

Definition of Export Trading Company

It is clearly the purpose of both the House and Senate to stimulate the establishment of export trading companies to improve U.S. export capabilities with corresponding favorable effects on American balance of trade, economic growth and employment. The major public benefit sought by enactment of export trading company legislation is jobs for Americans through the promotion of exports.

The necessity of export expansion has never been more obvious. The House amendment to S. 734 would require that a bank-affiliated export trading company be operated "exclusively" for purposes of exporting goods and services produced in the United States and would have permitted importing that was incidental to export activities—that is an import agreement that enhanced export activities would be acceptable. The use of the term "exclusively" was designed to ensure the export promotion and job creation character of the legislation.

The House, however, receded to the Senate by adopting the Senate's use of the term "principally" in defining the purposes of a bank-affiliated export trading company. This is no way implies a reduced commitment to the bill's purpose: U.S. export promotion. On the contrary, while it is understood that ETCs will periodically have to engage in importing, barter, third party trade, and related activities, the managers intend that such activity be conducted only to further the purposes of the Act. The managers do not expect the preponderance of ETC activity to involve importing.

ETC affiliation with banks represents a breach of the traditional separation of banking and commerce and has necessitated provision for a minimal but adequate regulatory presence. It is the intent of the managers that the regulatory authority, in addition to facilitating bank-related investments in ETCs, examine, supervise, and regulate ETCs in such a way as to assure that bank-affiliated ETCs operate in a manner consistent with the Congressional intent: that ETCs promote, increase, and maximize U.S. exports.

Product Modification

The conferees retained the prohibitions on manufacturing and agricultural production that were included in both the Senate bill and the House amendment. The export trading company is intended to be a service-providing organization and not the producer of the products it is exporting. The Senate, however, receded to the House amendment permitting the ETC to undertake incidental product modification, including repackaging, reassembling or extracting byproducts, as is necessary to enable U.S. goods or services to conform with foreign country requirements or to facilitate their sale in foreign countries. The ETC would also be permitted to provide any service deemed necessary to protect it from the additional risk incurred by such product modification.

Joint Ventures

The conferees intend that this title not affect the ability of individuals and organizations to form ETCs. State and local government entities, including port authorities, industrial development

corporations, and other non-profit organizations, could be an important source of overall export expansion and of the development of innovative export programs keyed to local, state, and regional needs. In addition, other organizations, for example, agricultural cooperatives, have similar experience and needs. This title in no way affects the ability of such organizations to continue these efforts including their ability to organize, own, participate in or support ETCs. This title addresses only the question of whether banking organizations should be authorized to invest in ETCs and, if so, the restrictions which would be placed on ETCs sponsored by such banking organizations.

The conferees stress that this title does not preclude a banking organization that is authorized to invest in an ETC from engaging in a joint venture, partnership or other cooperative arrangement with other authorized banking organizations or other nonbanking firms to organize an ETC. Such cooperative arrangements are in fact to be encouraged. There are numerous firms and organizations which may want to form an ETC but feel that they lack either investment capital or expertise. A banking organization may well be able to provide such assistance through a joint venture or partnership arrangement with these other firms. The ETC so supported, however, would be subject to the restrictions contained in this legislation inasmuch as a banking organization is investing in that ETC.

Permitted Services

Both the Senate bill and the House amendment contained a list of services which a bank-affiliated export trading company is permitted to provide. Those lists were identical except for three elements: (1) the Senate bill used the phrase "including, but not limited to" to make clear the list is a non-exclusive one; (2) the House amendment contained an explicit reference to "taking title"; and (3) the Senate bill's list included "insurance".

The House by receding to the Senate on the first issue, insured that the list of permitted services is a non-exclusive one. With regard to the second issue, "taking of title", the Senate receded to the House. The Senate bill would have implicitly permitted such an activity. To eliminate any possible ambiguity, the explicit authority contained in the House version was adopted.

Regarding "insurance", the House receded to the Senate with an amendment. The conferees determined it to be appropriate to permit bank holding companies to provide insurance on risks resident or located, or activities performed, outside of the United States. Since a large proportion of cargos moving overseas originate at a point that is located away from the port of shipment, it has become customary for insurance carriers providing insurance for such cargos to endorse their policies to cover cargos for export from the point of their origin in final transit to their destination, including ordinary delay and storage. Such ocean cargo "warehouse to warehouse" coverages provide insurance protection for all risks related to the land, air, or water transportation of the cargo in the United States as well as during the overseas transportation. In addition to permitting export trading companies to provide insurance

on risks outside of the United States, therefore, the conferees determined that it would facilitate the provision of export trade services for export trading companies to provide ocean cargo "warehouse to warehouse" insurance as well, and accordingly amended the definition of insurance activities permitted in support of export trade services, reflecting the conferees' decision.

Other Structural Changes

The conferees also considered the possibility of expanding the range of institutions eligible to invest in ETCs to include Edge Act Corporations. This proposal was included in the Senate bill because the expertise and experience of Edge Act Corporations in international trade matters made it logical to encourage their involvement in ETCs. On the other hand, the conferees were also concerned about the added potential risk to a bank if an ETC were formed by an Edge Act Corporation that was a subsidiary of a bank. It was the strong view of the House that the best protection for the bank and its depositors was to channel all trading company activity through the bankers' bank and bank holding company structures. Accordingly, the conferees agreed that Edge Act Corporations that are subsidiaries of bank holding companies are eligible to invest in ETCs. The inclusion of bankers' banks as eligible investors—a provision of both the Senate bill and the House amendment, will also facilitate the involvement of smaller banks in ETCs.

The conferees also discussed whether the mechanism for Board approval of a proposed investment should apply only to investments that would give the holding company control of the ETC, as in the Senate bill, or whether the standard in the Bank Holding Company Act requiring Board consideration of any investment constituting over 5 percent of an export trading company should apply.

In this case, the conferees, recognizing the newness of this concept, opted for the stricter House approach contained in the Bank Holding Company Act. In doing so, however, the conferees stressed their intent that the Board, as soon as possible, both decentralize this review process to the level of the Federal Reserve District Banks and consider providing guidelines for smaller investments (those that would not result in a controlling interest for the holding company) that would minimize the review process and reduce the regulatory burden on the Board.

Section 23A

The Senate receded to the House on the exemption of bank-affiliated export trading companies from the provisions of Section 23A of the Federal Reserve Act. During the start-up phase in an effort to encourage maximum bank participation in export trading company activities, the conferees believe that the overall limitation of ten percent of the consolidated capital and surplus of the bank holding company, on extensions of credit to an affiliated export trading company, would adequately protect affiliated banks from excessive risks, and that the exemption from the collateral requirement of existing law is necessary in view of the type of assets most ETCs. would have. The conferees, however, intend to review the de-

cision in connection with an imminent major revision of 23A either as part of a possible conference on legislation separately passed by the Senate or at such time as revisions to 23A receive final consideration by the Congress.

Reports

Section 205 of the substitute contains the Senate bill's provision calling for a report by the Federal Reserve two years after the enactment of this Act on the implementation of the banking provisions, recommendations for further changes in U.S. law to facilitate the financing of U.S. exports, and recommendations on the effects of ownership of U.S. banks by foreign banking organizations affiliated with trading companies doing business in the United States.

Export-Import Bank

The House receded with an amendment to the Senate on the latter's provision establishing a program of Export-Import Bank guarantees for loans extended by financial institutions or other creditors to ETCs or other exporters, where such loans are secured by export accounts receivable or inventories of exportable goods. The House amendment to the Senate provision clarifies the eligibility of public creditors (port authorities, agencies of state and local governments, and governmental instrumentalities) as well as private creditors for Export-Import bank guarantees.

Bankers' Acceptances

The conferees want to emphasize strongly that the adoption of this long overdue liberalization of the present limits on bankers' acceptance in one way is intended to impinge upon or restrict the inherent powers of the Federal Reserve Board to issue appropriate regulations to prevent circumvention of the new liberalized limits through the imprudent use of participation agreements. The conferees have been advised of an ongoing analysis by the Federal Financial Institutions Examination Council on the proper treatment of participation of bankers' acceptances, preparatory to the development of a proposed united policy approach by each Federal regulatory agency. The conferees encourage this action to the extent it is consistent with and in furtherance of the language, history, and purposes of this legislation or demonstrable safety and soundness concerns. In this regard, the conferees require that the Council report to the respective Committees of jurisdiction within 18 months after the date of enactment, the results of its analysis, a summary of any individual regulatory agency action viewed as needed, and any legislative recommendations relating to safety and soundness considerations. In the meantime, however, the conferees stress that no action should be taken, either by regulation or other requirement to preclude the use of bankers' acceptances through the use of participations, as contemplated by this legislation, by the widest number of American banks.

TITLE III—EXPORT TRADE CERTIFICATES OF REVIEW

The House and Senate Conferees agreed upon a substitute amendment for Title III of S. 734 which incorporates elements from both S. 734 and the House Amendment to S. 734.

Section 301 is a statement that the purpose of this Title is to promote U.S. export trade by affording U.S. business an export trade certificate of review process.

Section 302 provides the procedures a person must follow to apply for a certificate of review. To obtain a certificate of review, any individual, firm, partnership, association, public or private corporation, or other legal entity, including a public or private body, submits a written application to the Secretary of Commerce. The Secretary of Commerce shall forward applications and other specified information to the Attorney General within 7 days of receipt. All applications must be in a form and contain all information required by regulation.

Within 10 days of receiving the application, the Secretary of Commerce shall publish in the Federal Register a notice identifying the applicant and describing the conduct for which certification is sought.

Section 303(a) provides that a certificate shall be issued to a person who establishes that its proposed conduct will (1) result in neither a substantial lessening of competition or substantial restraint of trade within the United States nor constitute a substantial restraint of the export trade of any competitor of the applicant; (2) not unreasonably enhance, stabilize, or depress prices within the United States; (3) not constitute unfair methods of competition against competitors engaged in the export trade of goods or services exported by the applicant; and (4) not reasonably be expected to result in the consumption or resale in the United States of goods or services exported by the applicant. The Conferees intend that the standards set forth in this subsection encompass the full range of the antitrust laws.

Section 303(b) provides that within 90 days, the Secretary must determine whether the applicant's export trade, export trade activities, and methods of operation meet the standards of Section 303(a). The Secretary shall not issue the certificate without the concurrence of the Attorney General that the standards of Section 303 are met. The certificate must specify the export trade, export trade activities, and methods of operation certified, the person to whom the certificate is issued, and any terms and conditions deemed necessary by the Secretary or the Attorney General to assure compliance with the standards of subsection (a).

Section 303(c) provides for expedited certification where necessary; however, no certificate may issue before 30 days from the date of publication of the Federal Register notice, whether or not the application is expedited.

Section 303(d)(1) provides that the Secretary shall notify the applicant of an adverse determination and the reasons therefore.

Section 303(d) permits an applicant to request reconsideration of the Secretary's decision. The Secretary, with the concurrence of the Attorney General, shall respond within 30 days.

Section 303(e) provides for the return of documents submitted in connection with an application upon written request of an applicant whose certificate of review has been denied.

Section 303(f) provides that any aspect of a certificate procured by fraud is void ab initio.

Section 304(a) provides that the holder of any certificate of review is obligated to report to the Secretary changes relevant to the matters contained in the certificate and may seek an amendment to the certificate to reflect any necessary change. An application for amendment is to be treated as an application for the issuance of a certificate.

Section 304(b)(1) provides that the Secretary shall, at his own initiative or at the request of the Attorney General, seek information from a certificate-holder to resolve any uncertainty concerning compliance. Failure to comply with such a request is grounds for modification or revocation of the certificate pursuant to subsection (b)(a).

Section 304(b)(2) provides that the Secretary of Commerce, at his own initiative or at the request of the Attorney General, may seek revocation of the certificate.

Section 304(b)(3) is intended to assure that the Attorney General investigate persons other than the certificate-holder through use of the civil investigative demand as set forth in the Antitrust Civil Process Act as amended (15 U.S.C. 1311 et seq.) regarding activities which may not be in compliance with the standards in section 303(a). If, upon an investigation, the Attorney General determines that the export trade activities or methods of operation of the certificate-holder no longer comply with section 303(a) standards, he shall advise the Secretary who then must initiate a revocation or modification proceeding under subsection (b)(2).

Section 305(a) provides that a review of a grant or denial of an application for a certificate or an amendment thereto or revocation or modification thereof of any person aggrieved by such determination if such suit is brought within 30 days of the determination. Normally, the administrative record shall be adequate so that it will not be necessary to supplement it with additional evidence.

The Senate bill required, prior to revocation or modification of a certificate, a hearing as appropriate under the circumstances. The House bill did not require a hearing. In following the House approach, the Conferees understood that, should the Secretary nevertheless establish a hearing procedure, S. 734 would not require use of the procedures of the Administrative Procedures Act.

Section 305(b) provides that no action by the Secretary or Attorney General under this title, except for an action under Subsection 305(a), is subject to judicial review.

Section 305(c) makes explicit that any denial by the Secretary, in whole or in part, of a proposal for issuance of a certificate, or amendment thereto, or any determination by the Secretary to revoke the application, or reasons therefor, is not admissible in evidence in any administrative or judicial proceeding in support of a claim under the antitrust laws as defined in this title.

Subsection 306(a) protects a certificate-holder from criminal and civil antitrust actions, under both federal and state laws, whenever the conduct that forms the basis of the action is specified in, and

complies with, the terms of the certificate. Conduct which falls outside the scope of, or violates the terms of, the certificate is ultra vires and would not be protected. Such conduct would remain fully subject to criminal sanctions as well as both private and governmental civil enforcement suits under the antitrust laws.

The Conferees agreed that the protections conferred by a certificate extend to all members of a certified entity provided that each member is listed on the certificate.

Section 306(b)(1) permits persons injured by the conduct of a certificate-holder to bring suit for injunctive relief and single damages for a violation of the standards set forth in Section 303(a). Pursuant to section 306(b)(2), any such suit must be brought within two years of the date the plaintiff has notice of the violation. Section 306(b)(3) accords a presumption of legality to persons operating within the terms of conduct specified in a certificate. Subsection (b)(4) permits a certificate holder to recover the cost of defending the suit (including reasonable attorneys fees) if the claimant fails to establish that the standards of section 303(a) have been violated.

Section 306(b)(1) provides that all procedures applicable to antitrust litigation, including laws and rules to expedite a proceeding or to prevent dilatory tactics, apply to actions brought under this title. The standards under section 303(a), the remedies under this subsection, as well as the provisions concerning the statute of limitations, a presumption of validity, and the awarding of costs to the certificate holder, including attorneys fees, remain the exclusive provision governing actions under this Act. Moreover, section 16 of the Clayton Act, so far as it pertains to injunctive actions for threatened (as opposed to actual) injury or to violations of the antitrust laws such as sections 2, 3, 7, and 8 of the Clayton Act, are inapplicable to actions authorized by section 306 of this Act.

Section 306(b)(5) permits the Attorney General, notwithstnding the limitations in section 306(a)(1), to bring suit pursuant to Section 15 of the Clayton Act (15 U.S.C. 25) to enjoin conduct threatening clear and irreparable harm to the national interest.

Both the House and Senate versions contemplated the promulgation of guidelines to assist applicants, potential applicants, and the public in understanding the issuing authority's interpretation of the certification criteria. The Conferees agreed upon section 307, which is similar to the House version, except that the Secretary issues the guidelines. Under section 307, the Secretary, with the concurrence of the Attorney General, may publish guidelines that describe conduct with respect to which determinations have been made or might be made, with a summary of the factual and legal bases underlying the determinations. The guidelines may be based upon real or hypothetical cases. Because the purpose of this section is to disseminate information, the Secretary is not required to use rulemaking procedures, although he may if he so chooses.

The Conferees agreed upon section 308, which tracks the Senate version of a similar provision. Under section 307, every person to whom a certificate has been issued shall submit to the Secretary an annual report, in such form and at such time that he may require, that updates, where necessary, the information required by section 302(a).

The Conferees agreed upon section 309, which tracks version in the House. Under subsection 309(a), all information submitted by a person in connection with the issuance, amendment, or revocation of a certificate of review is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552. In addition, under subsection (b)(1), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information. This limitation is subject to six exceptions, contained in subparagraph 309(b)(2). The first exception in subsection 309(b)(2)(A), covers requests of Congress or a committee of Congress. This provision would not authorize release to an individual Member of Congress, but would authorize release to a Chair acting for the Committee or Subcommittee. The Conferees understand that Committees will exercise appropriate care to protect confidential information. The second exception, subparagraph 309(b)(2)(B), permits disclosure in a judicial or administrative proceeding subject to an appropriate protective order; the third exception, subparagraph 309(b)(2)(C), permits disclosure with the consent of the submitting party; the forth exception, subparagraph 309(b)(2)(D), permits necessary disclosures in making determinations on applications; the fifth exception, subparagraph 309(b)(2)(E), permits disclosure in accordance with statute; and the final exception, subparagraph 309(b)(2)(F), permits disclosure to agencies of the United States and the States if the receiving agency will agree to the limitations contained in subparagraphs (A) through (E).

Both the House and Senate versions contemplated the issuance of implementing rules. The Conferees agreed on section 310, which directs the Secretary, with the concurrence of the Attorney General, to promulgate rules and regulations necessary to carry out the purposes of the Act.

Both the Senate and the House versions defined important terms. The Conferees agreed to include, in section 311, a definition section which adopts elements from both versions as well as certain additional definitions necessary to ensure proper interpretation of Title III.

The Conferees agreed upon section 312, which is similar to the effective date provision in the House version. Under subsection 312(a), all provisions except sections 302 and 303 take effect immediately upon enactment of the legislation. Under subsection 312(b), sections 302 and 303 the application and issuance provisions, take effect 90 days after the rules are promulgated under section 310.

TITLE IV—FOREIGN TRADE ANTITRUST IMPROVEMENTS

The House and Senate Conferees agreed upon a new Title IV which supplements the antitrust certification provisions (Title III).

The new title incorporates two sections from H.R. 5235, passed by the House on August 3, 1982. These sections modify the Sherman Act and Section 5 of the Federal Trade Commission Act to require a "direct, substantial, and reasonable foreseeable" effect on commerce in the United States, or on the export commerce of a

U.S. resident, as a jurisdictional threshold for enforcement actions.,,1

For title I of the House amendment and modifications committed to conference:

JAKE GARN,
JOHN HEINZ,
WILLIAM ARMSTRONG,
JOHN H. CHAFEE,
JOHN C. DANFORTH,
DON RIEGLE,
BILL PROXMIRE,
CHRISTOPHER J. DODD,
ALAN DIXON,
Managers on the Part of the Senate.

For title I of the House amendment and modifications committed to conference:

CLEMENT J. ZABLOCKI,
JONATHAN BINGHAM,
DENNIS E. ECKART,
DON BONKER,
HOWARD WOLPE,
WM. BROOMFIELD,
ROBERT J. LAGOMARSINO,
ARLEN ERDAHL,
BENJAMIN A. GILMAN,
MILLICENT FENWICK,

For title II of the House amendment and modifications committed to conference:

FERNAND ST GERMAIN,
FRANK ANNUNZIO,
JOE MINISH,
JOHN J. LAFALCE,
DOUG BARNARD, JR.
J. W. STANTON,
CHALMERS P. WYLIE,
STEWART B. MCKINNEY,
JIM LEACH,

For title III of the House amendment and modifications committed to conference:

PETER W. RODINO,
BILL HUGHES,
ROBERT MCCLORY,
M. CALDWELL BUTLER,
Managers on the Part of the House.

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